

**COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW
AND THE SECTION OF INTERNATIONAL LAW ON THE
PROSPECTIVE AMENDMENTS TO JAPAN’S ANTIMONOPOLY ACT**

MARCH 2008

The Section of Antitrust Law and Section of International Law (together, “the Sections”) of the American Bar Association (“ABA”) appreciate the opportunity to present their views concerning the prospective amendments to the Japan Antimonopoly Act (“AMA”) that were released by the Japan Fair Trade Commission (“JFTC”) on October 16, 2007. The views expressed in these comments are those of the Sections and have been approved by the Sections’ Councils. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

The Sections have substantial expertise in the law in the United States, and have substantial familiarity with competition laws internationally. The Sections’ comments reflect this experience and draw on it and the *Guiding Principles and Recommended Practices for Merger Notification and Review Procedures* (“Recommended Practices”)¹ adopted by the International Competition Network (“ICN”), as relevant. We have earlier submitted comments regarding the JFTC’s draft leniency rules of immunity from or reduction of surcharges,² and to the Study Group on the Antimonopoly Act.³

Executive Summary

The Sections support the JFTC’s efforts to review and, as necessary, amend the Japan AMA. Although the prospective amendments cover a wide-range of issues, the Sections’ comments focus on three key areas: (1) the imposition of surcharges against private monopolization, (2) various procedural provisions, and (3) the pre-merger notification system.

The Sections recognize the challenge of finding the right balance between laws and regulations that deter anticompetitive conduct and polices while encouraging procompetitive conduct and policies. With respect to the imposition of surcharges against private

¹ See, *International Competition Network, Recommended Practices for Merger Notification Procedures*, available at <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprepractices.pdf>.

² Joint Submission of the American Bar Association’s Sections of Antitrust Law and International Law and Practice on the Japan Fair Trade Commission’s Draft Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges Implementing the Amended Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, August 2, 2005, available in Japanese at <http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/commentsJFTCjapanese.pdf> and in English at <http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/commentsJFTC.pdf>

³ Joint Comments of the American Bar Association’s Section of Antitrust Law, Section of Intellectual Property Law and Section of International Law and Practice on the Report of the Study Group on the Antimonopoly Act of Japan, January 30, 2004, available at <http://www.abanet.org/antitrust/at-comments/2004/02-04/abajftcessentialfacilitiesfinal.pdf>

monopolization and other unfair trade practices, the Sections respectfully encourage the Japanese government to consider whether the current system of remedying private monopolization through the imposition of cease-and-desist orders already may be effective in deterring the proscribed conduct such that the introduction of surcharges is not necessary. If, following such a review, the government nonetheless determines that a surcharge system is required to deter private monopolization, it may wish to carefully consider what factors are to be taken into account before a surcharge is imposed. In this regard, a system that allows for flexibility and discretion may help to avoid chilling procompetitive conduct.

The Sections support the JFTC's goal to improve fairness and transparency in its hearing procedures. Under the current system, the JFTC conducts investigations, issues surcharge and cease and desist orders, and also reviews its own orders on appeal. There are no rules separating the JFTC's prosecutorial functions from its adjudicative functions. Although there is no pending amendment addressed towards changing the hearing system, the Sections understand that the JFTC is considering proposing such an amendment, which the Sections support. The Sections respectfully recommend that the Japanese government consider amending the current system to allow for a right of review by the courts of first instance, in particular in cases involving the imposition of surcharges, or to implement rules ensuring the impartiality of adjudicative functions. In addition, the Sections respectfully recommend that the Japanese government amend the JFTC rules to provide for a right to counsel in JFTC investigations.

Finally, the Sections welcome the JFTC's desire to simplify the pre-merger notification thresholds for share acquisitions and respectfully urge the Japanese government to consider eliminating or raising the current percentage threshold that requires notification of an acquisition of only 10% of the acquired firm's voting rights.⁴ An acquisition of 10% of the voting rights in a firm is sufficiently low that the transaction is unlikely to result in any anticompetitive effects. The Sections also recognize the need for a notification regime that ensures that foreign transactions that affect Japan are notified. When defining a local nexus requirement, the Sections urge the Japanese government to follow the recommended practices of ICN, such as the recommendation that the local nexus requirement "be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory."

I. Imposition of Surcharges Against Unilateral Conduct

The Sections understand that the prospective amendments to the AMA would impose surcharges on companies that engage in certain types of exclusionary unilateral behavior that are determined to constitute private monopolization or unfair trade practices. The AMA currently permits the imposition of surcharges on entities that engage in cartel conduct, but not for most types of exclusionary unilateral behavior. Because the imposition of such surcharges for unilateral conduct presents important policy considerations, particularly the potential for chilling conduct that is competitively benign or even procompetitive, the Sections recommend that the

⁴ Under the Hart-Scott-Rodino Antitrust Improvements Act, acquisitions of voting securities solely for the purpose of investment, of no more than 10% of the outstanding voting securities of an issuer, are exempt from premerger notification. 15 U.S.C. §18a(c)(9); 16 C.F.R. §802.9.

proposed amendments to the AMA be crafted carefully to avoid unduly discouraging aggressive but beneficial competition in the marketplace.

In the United States, while violations of Sections 1 and 2 of the Sherman Act are subject to both criminal and civil penalties, the Sherman Act permits the imposition of fines for criminal violations only. The remedies available to the government in a civil enforcement action under the Sherman Act are limited to injunctive relief and damages incurred by the United States as a purchaser of goods.⁵ Private actions under the Sherman Act are also permitted. The current policy of the Antitrust Division of the United States Department of Justice (“DOJ”) is to criminally prosecute and seek fines only for *per se* unlawful cartel behavior, such as horizontal price fixing, bid rigging, and market or customer allocations. Monopolization and attempts to monopolize are almost invariably treated as civil matters. Even in matters involving horizontal restraints, criminal indictments and imposition of fines are not likely when the state of the law is unclear, there are novel issues of law or fact, or where the alleged perpetrators did not understand the unlawful nature of their conduct.

The Federal Trade Commission (“FTC”) enforces Section 5 of the Federal Trade Commission Act, which prohibits “unfair methods of competition,” and has been interpreted to include any conduct that would violate the Sherman Act. While the FTC has the authority to seek restitution and disgorgement of profits from past unlawful conduct, it will do so only under limited circumstances. In deciding whether to impose such a monetary remedy, the FTC will consider three factors:

First, the Commission will ordinarily seek monetary relief only where the underlying violation is clear. *Second*, there must be a reasonable basis for calculating the amount of a remedial payment. *Third*, the Commission will consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings.⁶

Apart from disgorgement, the FTC also has the authority to seek civil penalties (sometimes called “fines”) under two circumstances: for violations of final FTC orders to cease and desist, or the violation of a final agency rule with knowledge that the conduct is prohibited by the rule.⁷ In all cases, such penalties may be imposed only after court action.

The U.S. enforcement policy stems from the proposition that unlawful cartel behavior has no plausible efficiency justifications (a conclusion that has practically reached the level of

⁵ The United States may also seek civil penalties for violations of the Hart-Scott-Rodino Act, 15 U.S.C. §18a, which requires premerger notification and waiting periods for certain transactions.

⁶ See F.T.C. Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003). Note that the FTC also has jurisdiction to bring cases for “unfair and deceptive acts or practices” in the consumer protection arena. This jurisdiction involves different remedies, which are not relevant to the topic at hand and are therefore not addressed.

⁷ 15 U.S.C. § 45.

international consensus), and that cartels can be deterred only through vigorous prosecution and imposition of significant penalties. In this context, the DOJ's approach to criminal prosecutions (and consequently, fines) attempts to strike the proper balance between deterring anticompetitive behavior and promoting vigorous competition. However, while hard-core cartels are virtually always harmful to consumers, unilateral conduct causes competitive harm only in limited circumstances. Further, under U.S. law, the mere possession of monopoly power or a dominant market share is not in itself an antitrust violation. Indeed, the goal of achieving monopoly or high market share is an "important element of the free-market system."⁸

Accordingly, U.S. antitrust enforcement officials have flexibility in fashioning a monetary remedy that minimizes the risk of deterring competitive conduct. Injunctive relief can be tailored to remedy the anticompetitive effects of monopolistic conduct and prevent future violations, while at the same time preserving any procompetitive benefits of the conduct and resulting enhancement of consumer welfare.

Determining whether unilateral conduct has caused an anticompetitive effect generally requires significant factual and economic analysis, which may often be inconclusive and subject to reasonable debate. In contrast to cartel behavior, it can sometimes be difficult to distinguish between harmful exclusionary monopolization on the one hand, and zealous (but healthy) competition on the other. The imposition of liability in such instances may turn on whether the defendant has substantial market power, which is difficult to ascertain, even with the benefit of hindsight. This difficulty is compounded by the fact-intensive nature of relevant market analysis. The threat of surcharges for unilateral conduct may result in the deterrence of both anticompetitive and procompetitive behavior. The DOJ and FTC policies allow for vigorous prosecution of anticompetitive conduct, while also seeking to avoid over-deterrence of legitimate competition.⁹ These policies are based on significant experience, and in the Sections' view achieve the right balance.

The Sections respectfully suggest that the proposed amendments to the AMA be carefully crafted to avoid unnecessarily chilling procompetitive unilateral behavior. As an initial matter, the Sections encourage the Japanese government to consider whether the current system of remedying private monopolization through the imposition of cease-and-desist orders may already be effective in deterring the proscribed conduct such that the introduction of surcharges is not necessary. Indeed, the Japanese government may wish to consider whether it may make sense to reserve surcharges only for cases of failing to comply with an existing cease-and-desist order and/or for repeat offenders. If, following such a review, the government nonetheless determines that a surcharge system is required to deter private monopolization, it may wish to carefully

⁸ *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

⁹ See, e.g., Thomas O. Barnett, Ass't Att'y Gen., Antitrust Div., Seven Steps to Better Cartel Enforcement, Presentation to the 11th Annual Competition Law & Policy Workshop (June 2, 2006), available at www.usdoj.gov/atr/public/speeches/216453.pdf. The Sections recognize that private treble damages actions in the United States may provide additional deterrent effect, to supplement the deterrent of government prosecution, that does not exist to the same extent in Japan. On the other hand, the AMA may be considered more restrictive than U.S. law on what is permissible competitive conduct, and therefore may inherently offer more deterrence.

consider what factors are to be taken into account before a surcharge is imposed. A system that allows for flexibility and discretion may help to avoid chilling procompetitive conduct.¹⁰

As an example, the Sections note the reference in the prospective amendments to the imposition of surcharges for unfair trade practices such as abuse of a superior bargaining position. The Sections believe that the abuse of a superior bargaining position can be very difficult to identify correctly. It also is unclear to the Sections how the amount of the surcharge should be determined for a firm that has abused its superior bargaining position. Given the similarities between the effects of such an alleged abuse and procompetitive outcomes of the typical bargaining or negotiation process, accurately determining what an agreement or contract would have been but for the abuse will be difficult. As a result, adding the risk of surcharges to the uncertainty that may be associated with an abuse of a superior bargaining position may unintentionally deter procompetitive transactions that would have ultimately benefited consumers. The same deterrent effect also may arise if surcharges are applied to other types of unilateral conduct that are characterized as unfair trade practices such as price discrimination, unjust low pricing, and resale price maintenance.

II. Procedural Provisions of the Antimonopoly Act

The Sections support the JFTC's goal of ensuring fairness and transparency of public hearing examination procedures.¹¹ As the JFTC has been strengthening sanctions and available investigative tools in recent years, it has become increasingly important to ensure due process to targets of any investigation, including a fair opportunity for judicial review of JFTC decisions and an opportunity to be represented by counsel and to preserve privileges available in other jurisdictions that may be conducting concurrent investigations.

A. Review of JFTC decisions

The Sections support the JFTC's stated intention to propose changes to the current hearing system, particularly its intent to ensure that "the Commission shall not designate as a hearing examiner an official who has a conflict of interest with the person who has requested the hearing procedures on a specific case."¹² Under current administrative procedures, the JFTC conducts its own investigations, issues immediately enforceable cease and desist and surcharge payment orders, and also reviews such orders through post-verdict assessments/hearings. It is the Sections' understanding that only after such proceedings can a party appeal to the Tokyo High Court (equivalent to a U.S. appellate-level court), not the District Court, to request

¹⁰ The Sections are mindful that sole reliance on cease-and-desist orders may be insufficient in certain instances to deter potentially anticompetitive behavior. There is a need for balancing of over-deterrence and under-deterrence, and much care must be used to ensure that a surcharge is only imposed in cases where the law at issue is well-settled and where clear guidance is provided on the illegality of the conduct involved.

¹¹ Prospective Amendments to AMA, available at <http://www.jftc.go.jp/e-page/pressreleases/2007/October/taikou.pdf>.

¹² See, e.g., *JFTC Would Cede Tribunal Process Over Cartel Conduct to Judiciary*, 94 Antitrust & Trade Reg. Rep. (BNA) 2337 (Feb. 1, 2008).

revocation of the JFTC decision. The Tokyo High Court can only revoke an order based on unconstitutionality (or violation of other laws) or lack of substantial evidence supporting factual findings.¹³

The current system has been criticized for allowing JFTC officials to act as both prosecutor and adjudicator.¹⁴ The Sections recognize that the JFTC has endeavored to act fairly, but there is an inherent appearance of conflict in the present system. This is of particular concern in cases that may result in the imposition of surcharges, which are punitive in nature. In the United States, financial penalties for antitrust violations can only be imposed and appealed through federal courts.¹⁵

The FTC does have a similar administrative procedure where the Commission itself will review an initial order from an FTC adjudicative proceeding. However, these initial orders are cease and desist orders, and do not impose any financial penalties because the FTC cannot impose any such penalties without court action. In addition, the initial adjudicative proceeding is an adversarial proceeding before an administrative law judge. While there are specific FTC rules aimed at preserving the independence and impartiality of the administrative law judges and reviewing Commissioners, there are no analogous JFTC rules separating prosecutorial functions from adjudicative functions.¹⁶ At the least, the Sections suggest that improvements in the Commission's procedures go beyond avoiding a conflict of interest on the part of hearing examiners, to a separation of functions to ensure independence and impartiality of the hearing examiners. The Sections thus welcome the JFTC's proposals to provide for independent hearing examiners.¹⁷ It would also be beneficial if the examiners were trained in competition law and economics.

The Sections recommend that the JFTC also consider amending the current system to eliminate the hearing procedure before the JFTC tribunal in cases that would potentially result in the imposition of surcharges and allow for a first right of appeal to the district court. Such amendments would increase fairness and transparency and help align JFTC procedures with those in other jurisdictions.

¹³ See JAPANESE ANTIMONOPOLY ACT (Act No. 54 of 14 April 1947), Arts. 50(4) and 85.

¹⁴ See, e.g., Nippon Keidanren, *Proposal for Comprehensive Amendments to the Antimonopoly Act – To Establish International Parity in the Investigation and Appeals Process* (Nov. 20, 2007), available at <http://www.keidanren.or.jp/english/policy/2007/091.html>.

¹⁵ 15 U.S.C. §§ 45(l) & (m) (FTC civil penalty proceedings). Criminal fines likewise can only be imposed by the judiciary.

¹⁶ See, e.g., 5 U.S.C. §554(d).

¹⁷ Prospective Amendments to AMA, available at <http://www.jftc.go.jp/e-page/pressreleases/2007/October/taikou.pdf>.

B. Right to Counsel

It is the Sections' understanding that under the current system there is no specific allowance for representation by counsel during JFTC investigation procedures.¹⁸ The JFTC recently stated that “[i]t is not appropriate for a representative (an attorney-at-law) to be present at an investigator’s interrogation which is conducted to clarify the facts known to a deponent.”¹⁹

In this era of multijurisdictional antitrust investigations and increasing coordination and information sharing among enforcement authorities, it is particularly important for the target of an investigation to have a right to legal counsel to advise as to the potential risks and procedural differences in each jurisdiction. In addition, statements provided to governmental authorities may under certain circumstances be discoverable and/or admissible in private litigation in the United States and other jurisdictions. If such statements are provided without representation by counsel, certain protections and privileges that may be available in other jurisdictions may be considered to be waived.

In view of these considerations, the Sections respectfully recommend that the Japanese government amend the JFTC rules to allow representation by counsel with respect to responses to investigation requests, including witness interviews.

III. **Pre-Merger Notification System of the Antimonopoly Act**

The Sections welcomes the JFTC’s review of provisions concerning the merger notification and reporting system. In an increasingly global business environment, many acquisitions and mergers transcend national boundaries. A notification system that is consistent with international practice is critical to ensuring that non-problematic transactions are quickly reviewed and approved to the benefit of consumers in Japan and other parts of the world. Such a notification system must also ensure that foreign transactions that affect Japan are notified and subject to review as appropriate.

A. Simplification of Notification Thresholds for Share Acquisitions

The Sections believe the current amendment process presents the Japanese government with an opportunity to review the pre-merger notification thresholds for business combinations resulting from share acquisitions. The Sections understand that the Japanese government is considering simplifying the percentage thresholds for share acquisitions from a three-step notification structure (with thresholds at 10%, 25% and 50%) to a two-step structure (with thresholds at 20% and 50%), while continuing to implement yen-based thresholds. The proposed

¹⁸ In the United States, there is an absolute right to counsel during interrogation by an investigator. While there is no right to presence of counsel during a witness’s appearance before a U.S. grand jury, which performs an investigatory function, the use and disclosure (even to the testifying witness) of the transcripts of grand jury proceedings are subject to stringent rules. This is an aspect of the U.S. grand jury system that is controversial.

¹⁹ See *The Fair Trade Commission’s View on New Rules of the Amended Antimonopoly Act – Comments Addressed to the Commission Regarding the Draft of its Rules and the Point of View of the Commission*, available at http://www.jftc.go.jp/e-page/legislation/ama/view_on_newrules.pdf.

two-step percentage thresholds are somewhat similar in concept to the structure used in the United States, where voting security acquisitions are notifiable if they meet certain minimum dollar thresholds, the lowest of which is currently \$63.1 million (USD, adjusted annually), which minimizes the regulatory costs associated with relatively small acquisitions, and at two percentage thresholds – 25% (if valued in excess of \$1.2615 billion (USD, adjusted annually)) and 50%.

The Sections believe that a simplification of the percentage thresholds will benefit both the JFTC and the private sector. As a practical matter, an acquisition of 10% of the voting rights in a firm is sufficiently low that the transaction is unlikely to result in any anticompetitive effects. By not requiring a notification at the 10% threshold, the JFTC can allocate resources that would have been devoted to the review of such filings to other matters that are more likely to raise anticompetitive concerns. Similarly, reducing the regulatory costs associated with relatively small share acquisitions helps ensure that resources are transferred to their best use in a timely and efficient manner. Additionally, in the same manner that the United States adjusts its minimum dollar thresholds annually based on the growth of the U.S. Gross National Product, the Sections respectfully urge the JFTC to use the amendment process as an opportunity to ensure that the minimum yen thresholds in the AMA are still set at the appropriate levels and complement the proposed two-step percentage thresholds.

B. Notification Thresholds for Foreign Corporations

In determining the appropriate local nexus for transactions that involve foreign corporations, the Sections urge the Japanese government to consider the ICN's Recommended Practices for Merger Notification and Review.²⁰ The ICN's first recommendation relating to "Nexus to Reviewing Jurisdiction" is that "[j]urisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned." The ICN explains that requiring merger notification of transactions that are unlikely to result in appreciable competitive effects imposes unnecessary costs and commitment of competition agency resources. The prospective amendments to the AMA appear consistent in that they would require notification only where the transaction would affect the Japanese market.

The challenge is defining when a transaction has an appropriate nexus to the jurisdiction. The ICN recommends that the "[d]etermination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory." The ICN further explains that the notification should be required only when it "is likely to have a significant, direct and immediate economic effect" The Sections agree with the ICN's recommendations and highlights the importance of requiring activity within the jurisdiction by at least two parties. Such a requirement avoids a situation where a large multinational company based in the United States, for example, would be required to notify the JFTC of all mergers and acquisitions outside of Japan simply because it had a small support or sales office in Japan. The ICN observes that requiring activity by at least two parties is appropriate because the "likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification

²⁰ Available at: <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprepractices.pdf>.

requirement are normally not warranted.” If the Japanese government determines that the notification requirement may be satisfied by the activities of the acquired business alone, the Sections recommend, consistent with the ICN recommendations, that the threshold “be sufficiently high so as to ensure that notification will not be required for transactions lacking a potentially material effect on [the Japanese market].”

By way of example, the U.S. merger notification system requires notification of transactions between foreign firms if the acquisition confers control over the acquired firm and the acquired firm holds assets in or has made sales in or into the United States in excess of \$63.1 million (USD, adjusted annually). Nevertheless, the transaction is exempt from notification if (i) the parties both have combined assets in and have made combined sales in or into the United States not exceeding \$138.8 million (USD, adjusted annually), and (ii) the value of the voting securities held as a result of the acquisition does not exceed \$252.3 million (USD, adjusted annually). This approach avoids unnecessary delay of transactions lacking a nexus to the local market.

Conclusion

The Sections welcome the JFTC’s efforts to review and, as necessary, amend the AMA. The amendment process is an opportunity for the Japanese government to further refine the AMA and the JFTC procedures so that they effectively encourage procompetitive conduct while deterring anticompetitive conduct. The Sections appreciate the opportunity to submit these comments and hopes that the Japanese government finds them useful during deliberations on the amendments.